Palm Court Nursing Home N.H., L.L.C. and Hidden Palm ALF, L.L.C., Joint Employers *and* Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC. Cases 12–CA–22564 and 12–CA–23071

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On November 7, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, and the General Counsel filed an answering brief and a Motion to Strike the Respondent's exceptions and brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Palm Court Nursing Home N.H., L.L.C. and Hidden Palm ALF, L.L.C., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet with Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC because of the composition of its bargaining committee.

(b) Unilaterally changing unit employees' working conditions by instituting a 401(k) plan.

(c) Unilaterally increasing unit employee contributions for prescription drugs and the cost of using other than "preferred providers."

(d) Unilaterally reducing unit employees' paid holidays, jury duty days, and sick days.

(e) Unilaterally increasing the time required for advance notification for absences or tardiness.

(f) Unilaterally ceasing to provide unit employees with overtime pay for hours over 8 required to be worked in a single day.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nursing assistants, restorative nursing assistants, activity aides,

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to meet with the Union because of the composition of its bargaining committee, or to his recommended dismissal of the allegation that the Respondent violated the Act by unilaterally changing the employees' dress code.

[2] The General Counsel has moved to strike the Respondent's exceptions and brief on the grounds that they do not fully comply with the requirements of Sec. 102.46 of the Board's Rules and Regulations. We find that the Respondent's exceptions and brief together sufficiently designate the Respondent's points of disagreement with the judge's decision even though they are not fully in compliance with the literal requirements of Sec. 102.46. Accordingly, the General Counsel's motion to strike is denied.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge found that the Respondent's July 18, 2002 letter, which referenced proposed changes in employee benefits for "employees covered under the collective bargaining agreements for Greystone," clearly did not apply to the Palm Court employees who were not at that time covered under a collective-bargaining agreement. (Greystone Health Care Management managed the Palm Court facility as well as seven other facilities in Florida that had collective-bargaining agreements with the Union.) The Respondent argues, however, that because the July 18 letter was addressed to Union Secretary-Treasurer Dale Ewart, who was directly responsible for representing the Palm Court employees, Ewart should not have disregarded the letter as inapplicable to Palm Court, but rather should have understood that the letter was intended to apply to the Palm Court employees. We disagree with the Respondent. In addition to his Palm Court responsibilities, Ewart also supervised two union representatives who were responsible for representing employees covered by collective-bargaining agreements at other Greystone facilities to which the letter did apply. Because the letter could have been sent to Ewart in his supervisory capacity, there was no reason for Ewart to have understood, contrary to the plain meaning of the letter, that the benefit changes discussed in the letter were intended to be applicable to Palm Court. We agree with the judge that the letter on its face did not apply to Palm Court, and we find that nothing in the fact that the letter was addressed to Ewart reasonably should have alerted him to any proposed benefit changes at the Palm Court facilities.

[5] We shall modify the judge's recommended Order to provide that, upon request of the Union, the Respondent shall rescind the unilaterally instituted 401(k) plan. In addition, the Respondent shall be ordered to rescind any discipline issued to employees as a result of the unilateral change in the absentee policy and to make employees whole for any losses resulting from the change. Finally, we shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

central supply clerks, medical records clerks, dietary aides, cooks, housekeeping aides, housekeeping employees, laundry aides, laundry employees, porters and maintenance employees, and unit secretaries employed at the Respondent's facilities located at 2675 North Andrews Avenue and 2675-A North Andrews Avenue, Fort Lauderdale, Florida; excluding all other employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act.

(b) Upon the request of the Union, rescind the 401(k) plan, the increase in employee contributions for prescription drugs and the cost of using other than "preferred providers," the reduction in the number of paid holidays, jury duty days, and sick days, the increase in the time required for advance notification for absences or tardiness, and the cessation of overtime payment for hours over 8 required to be worked in a single day.

(c) Make whole all unit employees affected by the increase in contributions for prescription drugs and the cost of using other than "preferred providers," in the manner set forth in the remedy section of the decision.

(d) Make whole all unit employees for any pay lost as a result of the reduced number of paid holidays, jury duty days, and sick days extended to employees, in the manner as set forth in the remedy section of the decision.

(e) Make whole all unit employees who were deprived of overtime pay for hours over 8 required to be worked in a single day after April 28, 2003.

(f) Rescind any discipline issued to unit employees as a result of the increase in the time required for advance notification for absences or tardiness.

(g) Make whole all unit employees for any losses resulting from the increase in the time required for advance notification for absences or tardiness, with interest computed in the manner set forth in the remedy section of the decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2002.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet with Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC because of the composition of its bargaining committee.

WE WILL NOT unilaterally, without notifying and bargaining with the Union, change your working conditions by instituting a 401(k) plan; increasing your contributions for prescription drugs and the cost of using other than "preferred providers"; reducing your paid holidays, jury duty days, and sick days; increasing the time required for advance notification for absences or tardiness; and ceasing to provide overtime pay for hours over 8 required to be worked in a single day.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon the request of the Union, bargain with the Union as your exclusive bargaining representative in the following appropriate unit concerning your terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nursing assistants, restorative nursing assistants, activity aides, central supply clerks, medical records clerks, dietary aides, cooks, housekeeping aides, housekeeping employees, laundry aides, laundry employees, porters and maintenance employees, and unit secretaries employed at our facilities located at 2675 North Andrews Avenue and 2675-A North Andrews Avenue, Fort Lauderdale, Florida; excluding all other employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL, upon the request of the Union, rescind the 401(k) plan, the increase in unit employee contributions for prescription drugs and the cost of using other than "preferred providers," the reduction in the number of paid holidays, jury duty days, and sick days, the increase in the time required for advance notification for absences or tardiness, and the cessation of overtime payment for hours over 8 required to be worked in a single day.

WE WILL make whole all unit employees affected by the increase in contributions for prescription drugs and the cost of using other than "preferred providers."

WE WILL make whole all unit employees for any pay lost as a result of the reduced number of paid holidays, jury duty days, and sick days extended to employees.

WE WILL make whole all unit employees who were deprived of overtime for hours over 8 required to be worked in a single day after April 28, 2003.

WE WILL rescind any discipline issued to unit employees as a result of the increase in the time required for advance notification for absences or tardiness.

WE WILL make whole all unit employees for any losses resulting from the increase in the time required for advance notification for absences or tardiness.

PALM COURT NURSING HOME N.H., L.L.C. AND HIDDEN PALM ALF, L.L.C.

Jill Guarascio and *Jennifer Burgess-Solomon, Esqs.*, for the General Counsel.
David F. Jasinski, Esq., for the Respondent.
Dale Ewart, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on September 2 and 3, 2003.[1] The consolidated complaint issued on July 30, 2003.[2] Pursuant to a private settlement between the Charging Party and Respondent, I approved the request of the Charging Party to withdraw the charge in Case 12–CA–22990, and that case number is no longer reflected in the caption. Pursuant to the withdrawal of the charge, I severed that case and dismissed the complaint allegations predicated upon that charge. The remaining portions of the complaint allege a refusal to bargain and various unilateral changes in violation of Section 8(a)(5) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent did violate Section 8(a)(5) of the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Palm Court Nursing Home N.H., L.L.C., a Delaware corporation, is engaged in the operation of a nursing home in Fort Lauderdale, Florida, at which it annually derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $10,000 directly from points located outside the State of Florida.

The Respondent, Hidden Palm ALF, L.L.C., a Delaware corporation, is engaged in the operation of an assisted living

[1] All dates are in 2002 unless otherwise indicated.

[2] The charge in Case 12–CA–22564 was filed on October 18 and was amended on January 22, 2003. The charge in Case 12–CA–23071 was filed on June 2, 2003.

facility in Fort Lauderdale, Florida, at which it annually derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $10,000 directly from points located outside the State of Florida.

The amended answer admits that the foregoing entities, herein collectively referred to as the Company or the Respondent, constitute a joint employer, and I find and conclude that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to March 2002, the facilities at Fort Lauderdale had been operated by a management group identified in the record as Broadway Health Care. In March, Greystone Health Care Management began operating the facilities. In addition to the Palm Court and Hidden Palm facilities in Fort Lauderdale, Greystone began managing seven other facilities in Florida that had formerly been managed by Broadway, all of which had collective-bargaining agreements with the Union. Greystone also manages facilities in States other than Florida.

On April 25, the Union was certified as the exclusive collective-bargaining representative of employees in the following unit at Palm Court and Hidden Palm:

> All full-time and regular part-time certified nursing assistants, restorative nursing assistants, activity aides, central supply clerks, medical records clerks, dietary aides, cooks, housekeeping aides, housekeeping employees, laundry aides, laundry employees, porters and maintenance employees employed at the Respondent's facilities located at 2675 North Andrews Avenue and 2675-A North Andrews Avenue, Ft. Lauderdale, Florida; excluding all other employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act.

On July 23, 2003, the Regional Director approved a stipulation by the parties that added the position of unit secretary to the foregoing unit.

On April 30, the Union sent to the Company a request for information that included a request for employee names and addresses, "current company personnel policies" and "all company fringe benefit plans." The information relating to employees was provided by letter dated August 20. The remainder of the information was provided on November 27.

Rita Lemon is director of human resources and labor relations for Greystone. Lemon has responsibility for all of the facilities managed by Greystone in Florida: the seven facilities with collective-bargaining agreements and Palm Court and Hidden Palm in Fort Lauderdale. Lemon's office is in Tampa, Florida. She assumed her duties on March 10, when Greystone assumed management of the Florida facilities. On July 18, Lemon wrote SEIU Local 1199, "Attention: Mr. Dale Ewart." Ewart is secretary-treasurer of SEIU Local 1199. The letter states that Lemon wished "to provide information concerning a change in the employee benefits *that we would like to make effective August 1, 2002, for all employees covered under the collective-bargaining agreements* for Greystone . . . ." (Emphasis added.) The letter then explains that the proposed changes would relate to replacing the current health care providers at the facilities with collective-bargaining agreements with a new provider, Allied Benefits, and that certain benefits would also change. The letter, in the first paragraph on the second page, notes: "At the same time as the enrollment for medical and dental coverage, we are offering participation in a 401K plan." The letter concludes by requesting the Union to "review the enclosed benefit summary for the medical and dental plans," and invites the Union to discuss the proposed action if it should wish to do so. It is undisputed that the Union made no request to bargain at the facilities with collective-bargaining agreements and the change in providers was made at those locations.

The change in the medical administrator and benefits was also made at Palm Court and Hidden Palm effective August 1. The Union filed no charge, and there is no complaint allegation regarding the change in carriers or changes in health benefits in August.

B. Facts

The parties met for their first negotiating session on September 24. The union negotiating committee consisted of Ewart, organizer Gertha Joseph, employee Marianne Raymond, and employee Pauline Grant-Clarke, a unit secretary. The company committee was composed of Attorney David Jasinski, Director Lemon, and Linda Withers who was the administrator at Palm Court and Hidden Palm at that time. At the outset of the meeting, Attorney Jasinski objected to the presence of unit secretary Grant-Clarke, stating that "she had access to confidential information, [t]hat she was an individual whose interests were more aligned with that of management, [t]hat she was involved in the transfer of CNS's [and that her] job was not part of the bargaining unit."

Ewart noted that Grant-Clarke was on the *Excelsior* list, had voted without challenge, and was included on the list of employees furnished to the Union by Lemon on August 20. Jasinski asserted that the Company had made a mistake in including Grant-Clarke on the *Excelsior* list. Ewart pointed out that, even if Grant-Clarke was not in the unit, "the Union had the right to compose its committee as it saw fit."

Ewart asked to which records Grant-Clarke had access. Following a caucus of the company committee, Lemon advised that the Company would "get back" with that information. No information was thereafter provided. This record does not establish the nature of any confidential information to which Grant-Clarke had access nor does it establish that she was involved in the transfer of CNAs.

Attorney Jasinski informed Ewart, "[W]e could not continue to go forward with the negotiation while Ms. Grant-Clarke sat there on behalf of the Union." The Union refused to dismiss Grant-Clarke from the negotiating committee. In view of Jasinski's statement, the Union did not appear at the negotiating session scheduled for September 25.

Almost 4 months later, on January 16, 2003, the Company advised the Union that "any differences concerning the composition of the bargaining unit must be set aside" and that it proposed to continue negotiations "with your selected bargaining committee." The parties met for their second and third negotiating sessions on February 13 and 14, 2003.

On November 27, during the bargaining hiatus, the Company provided a package of information to the Union pursuant to its information request of April 30. The package included the then-current employee handbook and a two-page sheet listing employee benefits.

Secretary-Treasurer Ewart testified that the two-page sheet that he identified at the hearing, General Counsel's Exhibit 12(c) (GC 12(c)), was the sheet that he received. Attorney Jasinski, who testified on behalf of the Respondent, asserted that the sheet he sent to Ewart was Respondent's Exhibit 2(SUB 45 & 46) (R. 2(SUB 45 & 46). Resp. 2(SUB 45 & 46) differs from GC 12(c) in that it provides for 9 rather than 11 holidays and for 8 rather than 10 sick days. Resp. 2(SUB 45 & 46) does not list Martin Luther King Day, Good Friday, and Columbus Day as holidays, but it provides for two, rather than one, personal days. The net loss is two holidays. The format of both documents is similar, but not identical. The document Ewart testified that he received (GC 12(c)) does not contain an initial statement appearing on Resp. 2(SUB 45 & 46), that "BENEFITS AS OUTLINED BELOW ARE NOT AVAILABLE TO EMPLOYEES ELECTING A HIGHER RATE OF PAY AS 'NO BENEFIT' STATUS." The initial paragraph of both documents refers to an entity identified as Gardenview, stating, "Gardenview has selected Allied Benefits to be the third party administrator" of its health care benefits. Attorney Jasinski identified Gardenview as a facility administered by Greystone in Baltimore, Maryland.

Ewart first became aware of the change in holidays when bargaining unit employees reported to him that they had not been paid for Martin Luther King Day in 2003. Employee Grant-Clarke corroborated Ewart, explaining that she first became aware of the reduction in holidays when employees were not paid for Martin Luther King Day in January 2003 and that she brought this to the attention of the Union at that time.

The Union raised the matter of the Martin Luther King Day holiday when the parties resumed negotiations on February 13, 2003. Ewart testified that Lemon stated that she would look into it. Ewart was unable to attend the fourth negotiating session, which was held on April 7, 2003. Organizer Gertha Joseph was spokesperson for the Union in that meeting. Joseph again raised the matter of the Martin Luther King Day holiday, and referred to the document (GC 12(c)), listing 11 holidays that she had obtained from Ewart's files. Attorney Jasinski stated to Joseph, "I don't know where you got that." Joseph responded, "We got that from the packet that you sent us." Lemon recalls informing Joseph, "[T]hat's why we went with the two personal days," noting that an employee could take a personal day on Martin Luther King Day if the employee so desired. Although, as already noted, Jasinski testified that he provided a different document to Ewart in the information he sent on November 27, he did not provide that document to Joseph when he questioned where she had obtained the document that was in her possession. When responding to the charge herein relating to the alleged unilateral changes, Attorney Jasinski provided a position statement that attached a document that reflected the reduced holidays and sick days; however, in the initial paragraph of that document, rather than the reference to Gardenview, the document states "this facility." Attorney Jasinski acknowledged providing that document and admitted to the foregoing difference in wording. That document was not offered into evidence.

I credit Ewart and find that he was provided with the document reflecting 11 holidays and 10 sick days (GC 12 (c)). The record contains no explanation regarding the third document, provided with the Company's position statement, referring to "this facility" rather than Gardenview. The vacation days and sick days, 11 and 10 respectively on GC 12(c) and 9 and 8 on Resp. 2(SUB 45 & 46), appear on the second page of these similarly formatted documents. No explanation was offered regarding how the sheet Ewart identified that he received would have come into his possession other than by delivery from the Company. I find, consistent with the testimony of Ewart, that the Company, when responding to the Union's information request regarding employee benefits, provided him with the document identified as GC 12(c) which provides for 11 holidays, 10 sick days, and 15 days of jury duty pay.

Director Lemon testified that, when she wrote the Union on July 18, 2002, advising of the proposed change in health care carriers "for all employees covered under the collective-bargaining agreements," in addition to the specific summary relating to the medical and dental plans to which her letter referred, she also attached a two-page document that briefly summarized those benefits as well as holidays, sick days, and jury duty pay. The summary does not reflect the 401(k) plan. The summary that Lemon asserted she attached to the letter is identical to Resp. 2 (SUB 45 & 46) that Attorney Jasinski claims he provided to Ewart, including the reference to employees electing "no benefit" status and "Gardenview" having selected Allied Benefit as its medical plan administrator. Ewart denied that the two-page summary was attached. Regardless of whether the purported summary was attached, Lemon's letter of July 18 makes no mention of Palm Court or Hidden Palm. It relates only to facilities with collective-bargaining agreements. Once negotiations began, the Respondent made it clear that it would not agree to the contractual language in effect at Greenstone's other seven Florida locations at Palm Court and Hidden Palm. Attorney Jasinski, in a letter dated November 13, chastises the Union for insisting upon contractual "language negotiated with other facilities." The record does not reflect the provisions of those agreements with regard to holidays and sick days or whether the benefits in the summary purportedly attached to Lemon's letter correctly reflected the benefits that are provided by those collective-bargaining agreements.

Lemon testified that, effective August 1, in addition to the new health plan, Greystone implemented the 401(k) plan as well as its policies regarding holidays, sick days, and jury duty pay at Palm Court and Hidden Palm. Lemon further testified that employees were advised of these changes, as well as the changes in medical carriers and benefits, at a meeting that she conducted in July in Fort Lauderdale. Employee Pauline Grant-

Clarke testified that she recalled no such meeting conducted by Lemon, that the Administrator, who at that time was Linda Withers, typically conducted such meetings. She does not recall seeing Lemon until September 24, when she met her at the first negotiating session. Lemon was not recalled to rebut Grant-Clarke's testimony that the first time Grant-Clarke saw her was on September 24. No documents reflecting travel by Lemon to the Fort Lauderdale facility between July 18, the date of her letter to the Union, and August 1 were offered into evidence.

Employee Pauline Grant-Clarke testified that she first became aware of the change in holidays when employees were not paid for Martin Luther King Day in 2003 and of the 401(k) plan when she saw an application form in February 2003. Secretary-Treasurer Ewart testified that he was unaware that employees at Palm Court and Hidden Palm were being offered participation in a 401(k) plan until sometime in the spring of 2003.

I credit Grant-Clarke. There is no evidence corroborating Lemon's claim that she addressed the Fort Lauderdale employees in July, and I do not credit her testimony that she did so. I find it incredible that employees would not have protested to the Union about the reduction in holidays and sick days if Lemon had, in fact, informed them of those reductions in July. I further note that, when the Union raised the matter of the Martin Luther King holiday in 2003, Lemon referred to personal days. She did not respond that she had announced the elimination of the holiday the previous July.

In its brief, the Respondent argues that employees were not paid for the Columbus Day holiday in October 2002. There is no probative evidence to this effect in the record. I have not credited Lemon's testimony that she announced a change in holidays, and I do not credit her testimony that the change was implemented on August 1. In November, the Company provided information to the Union (GC 12(c)), reflecting 11 holidays. No payroll records reflecting the absence of holiday pay for Columbus Day in October 2002 were offered into evidence. The Respondent's brief notes that Grant-Clarke acknowledged that she was told that Columbus Day had been eliminated as a holiday. Grant-Clarke testified that, when she was not paid for Martin Luther King Day, she spoke with the employee who handled payroll and was informed that both days had been "cut out" and that employees "were no longer going to be paid for those two days." The foregoing statement referred only to a prospective absence of holiday pay for Columbus Day.

On August 18, Ewart wrote the Company and again requested that the information that he had initially sought on April 30 be provided. In the letter he also accused the Company of making "numerous unilateral changes." Ewart testified that the reference to unilateral changes related "primarily" to failure to grant anniversary wages to employees as set out in a letter from former Internal Organizing Director Hill to Lemon dated May 31, and to "minor procedural changes" affecting housekeeping employees as set out in a letter from organizer Joseph dated July 10. The Respondent's brief notes that Ewart did not specify the changes to which he was referring, implying that it may have related to the changes that the Company alleges were announced by Lemon to employees in July. Confirmation that Lemon understood that Ewart's letter related to problems with anniversary raises and housekeeping is established by her response to Ewart, dated August 20. The response assures the Union that employees had received their appropriate raises and notes the changes in the housekeeping department. It includes the information relating to employees that the Union had requested on April 30. It does not assert that the information relating to benefits had been provided.

In late February 2003, the Company distributed a memorandum to employees reflecting changes in its medical plan effective March 1, 2003. The changes included an increase in employee copayments for prescription drugs, including an increase in the cost of generic drugs ordered by mail, and a decrease in payment for visits to other than "preferred providers." Employee Grant-Clarke provided the document that had been distributed to employees to organizer Gertha Joseph. There was no notice to or bargaining with the Union regarding the March 1, 2003, changes in the medical plan.

On April 28, 2003, the Company distributed a new employee handbook. In reviewing that handbook, Ewart and organizer Joseph became aware that the Company had reduced sick days from 10 to 8 and days for which employees would be paid for jury duty from 15 to 10.

The handbook provided to the Union in the information packet sent on November 27 does not specify holidays or sick leave. Those benefits, 11 holidays and 10 days of sick leave, are reflected in GC 12(c), the document provided to the Union in the packet sent on November 27. Jury duty pay, a maximum of 15 days of pay for employees called to jury duty, is reflected on GC 12(c) as well as in the former handbook. The new employee handbook provides for 9 holidays, 8 days of sick leave, and 10 days of jury duty pay. The document that Attorney Jasinski acknowledges sending Ewart, although providing for only 9 holidays and 8 days of sick leave, provides for up to 15 days pay for jury duty.

Director Lemon testified that in August 2002, which would have been after the change in medical providers but prior to November 27 when Attorney Jasinski provided the Union with the then current employee handbook for employees at Palm Court and Hidden Palm, she met with Union Representative Christi Costello. Costello was responsible for administering the collective-bargaining agreements for the facilities on the Florida West Coast. Lemon and Costello met to finalize the collective-bargaining agreement for Colonial Health Care, now identified as Lexington. Lemon testified that, at that meeting, she gave Representative Costello a copy of the draft of the new handbook. Lemon asked if she should forward a copy of the draft to Ewart and recalls that Costello replied that she "didn't think it made any difference because . . . they were not going to accept or deny anything that was in there, that I needed to do what I needed to do."

Lemon did not testify that she informed Costello of any proposed distribution date for the new handbook. The draft of the handbook that Lemon testified that she presented to Costello was not offered into evidence; thus there is no evidence regarding what it provided. Assuming that its draft provisions constituted notice to the Union of proposed changes at the facilities with collective-bargaining agreements, there is no evidence that the Company notified the Union of proposed changes in the

status quo at the facilities in Fort Lauderdale prior to their implementation.

In January, the Company failed to pay holiday pay for Martin Luther King Day. Although the Union had learned about that failure, there is no credible evidence that the Union was aware that the failure occurred pursuant to a change in holidays until the bargaining session of April 7, 2003, when Lemon referred to the employees having two personal days. It did not become aware of the extent of the reduction in holidays until it reviewed the new handbook. There is no evidence that the Union was aware of the reduction in sick days or of the reduction in days for which employees would be paid for jury duty prior to receipt of the new handbook. The employee handbook that the Respondent admitted providing to the Union in November in response to its information request provides that employees who are going to be absent or tardy must notify their supervisor "at least one hour" before the shift begins and that employees who are required to work overtime receive overtime pay for hours worked over 8 in a single day and 80 in a pay period. The handbook distributed on April 28, 2003, requires "(2) two hours advance notice" for employees working on day shift and "(4) four hours" notice for employees working on the evening or night shifts. The overtime policy no longer provides overtime for hours worked over 8 in a single day if the employee is required to work overtime. There was no notice to or bargaining with the Union concerning the changed policies as reflected in the handbook distributed to employees at the Fort Lauderdale facilities on April 28, 2003.

C. Analysis and Concluding Findings

The complaint, in subparagraph 8(a), alleges that the Respondent, from September 24 until February 13, 2003, refused to bargain because the Union's bargaining committee included an employee who the Respondent asserted was a confidential employee who was not in the unit. The Respondent, in its brief, argues that the Union "insisted upon the . . . inclusion in the bargaining unit of Pauline Grant-Clarke." The foregoing argument is unsupported by any record evidence. When the Respondent objected to Grant-Clarke's presence, the Union pointed out that she had voted without challenge. The Respondent asserted that this was a mistake on its part. Ewart then noted that, even if Grant-Clarke was not in the unit, "the Union had the right to compose its committee as it saw fit." The only insistence established by the evidence is Attorney Jasinski's statement to the Union, "[W]e could not continue to go forward with the negotiation while Ms. Grant-Clarke sat there on behalf of the Union."

It is well established that to be found to be a confidential employee there must be a "labor nexus." The fact that an employee has access to nonlabor related matters, even though confidential, is "irrelevant to the determination of whether [a] secretary [is] a confidential employee." *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 191–192 (1981). Although the Respondent objected to Grant-Clarke's participation in negotiations because of her purported access to confidential information and "transferring CNAs," there was no evidence presented at the hearing regarding either of these contentions. In view of the Respondent's later agreement that Grant-Clarke could serve upon the Union's negotiating committee, it is obvious that there was no claim that she was a supervisor. Even assuming that Grant-Clarke, as a unit secretary, had access to confidential information relating to patients or residents, there is no evidence that she had access to labor related information regarding unit employees. Although the Respondent correctly argues that the position of unit secretary was not included in the unit description, the Respondent fails to note that the unit description does exclude confidential employees. Despite this exclusion, her name appears on the Excelsior list, and she voted without challenge. Although Attorney Jasinski asserted that this was a "mistake," when the Union requested evidence supporting the Respondent's contention that she was a confidential employee, the Respondent stated that it would "get back" with the information. No information was provided.

Even if Grant-Clarke was not properly a member of the unit as it was constituted at that time, the Union had the right to include her on its negotiating committee. Longstanding precedent establishes that "[e]mployers and unions have the right 'to choose whomever they wish to represent them in formal labor negotiations.' *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969)." Parties must deal with the chosen representatives who appear at the bargaining table except in the rare circumstance when the "the presence of a particular representative . . . makes collective bargaining impossible or futile." *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980). See also *R.E.C. Corp.*, 307 NLRB 330, 333 (1992). As argued by the General Counsel, there is no evidence that the presence of Grant-Clarke constituted an "exceptional circumstance" that permitted the Respondent to refuse to bargain.

Following the filing of the charge in Case 12–CA–22564, the Respondent advised that it would set aside "any differences concerning the composition of the bargaining unit" and would negotiate "with your selected bargaining committee." The Respondent, when agreeing to bargain, did not repudiate its prior conduct. See *Passavant Memorial Hospital*, 237 NLRB 138 (1978). I find that by refusing to bargain for approximately 4 months, the Respondent violated the Act.

The complaint alleges in subparagraph 8(b) that the Respondent unilaterally instituted a 401(k) plan for its employees in late February 2003. On the basis of the credited evidence, the first occasion upon which employees learned that they were eligible for the benefit of a 401(k) plan was when enrollment applications appeared, and employee Grant-Clarke testified that they did so in February 2003. Neither of the benefit summaries, either the one received by Ewart or the one that Jasinski asserts he sent, reflects the presence of a 401(k) plan. I have not credited Lemon's testimony that she conducted a meeting at Fort Lauderdale in July. Even if Linda Withers, the former administrator, had informed employees that, in addition to enrolling in the new medical and dental plans, they could also enroll in a newly instituted 401(k) plan, that announcement to employees would not constitute notice to the Union. See *Pilgrim Industries*, 302 NLRB 591, 594 (1991). I find that the first occasion upon which the Union was aware that the Respondent was offering employees a 401(k) plan was when employee Grant-Clarke reported this in late February 2003. By instituting the

benefit of a 401(k) plan without notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

The complaint, in subparagraph 8(c), alleges that the Respondent, on or about March 31, 2003, "changed its employees' medical insurance plan, including increasing employees' copayment for prescription drugs." As described above, the document announcing this change was distributed in late February. Although the complaint alleged the change as occurring on March 31, 2003, the document establishes that the change was effective March 1, 2003. In addition to increasing the cost of prescription drugs, the cost to employees being treated by physicians other than "preferred providers" was increased from 30 to 50 percent. There is no evidence that there was any notice to or bargaining with the Union prior to the announcement and implementation of these changes that clearly increased employees' health benefits cost. The Respondent, in its brief, does not address the foregoing changes in benefits. By unilaterally increasing the employee contribution for various aspects of their health care, the Respondent violated Section 8(a)(5) of the Act.

Subparagraph 8(d) alleges a reduction in the number of paid holidays, paid jury duty days, and paid sick days on or about April 28, 2003, the date the new employee handbook was distributed to employees. The Respondent argues that this allegation is barred by Section 10(b) because the Union was placed on notice of these changes by Lemon's letter of July 18 to Secretary-Treasurer Ewart and its purported announcement to employees in July.

Section 10(b) is an affirmative defense.

> Section 10(b) is tolled until the Charging Party has either actual or constructive notice of the alleged unfair labor practice. The Board has ruled that this "notice, whether actual or constructive, must be clear and unequivocal, and that the burden of showing such notice is on the party raising the affirmative defense of Section 10(b)." *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 996 (1986) [Footnotes omitted.]

Ewart credibly testified that he received no communication from the Respondent relating to proposed changes at Palm Garden and Hidden Palm in July. The letter of July 18 specifically refers to the facilities at which there were collective-bargaining agreements. Notwithstanding the clear language in the letter, the Respondent argues that the letter was "meant to deal with Palm Court" and that Ewart "had an obligation . . . to seek some clarification from Ms. Lemon" regarding the content of the letter. I am aware of no case authority, and the Respondent has cited none, that requires a Union to determine if some hidden message is contained behind the clear words reflecting a change in benefits "that we would like to make effective August 1, 2002, for all employees covered under the collective-bargaining agreements." Any contention that the Respondent intended the July 18 letter to also relate to its Fort Lauderdale facilities, at which there was no collective-bargaining agreement, is undercut by the uncontraverted evidence that the Respondent would not agree to accept at Fort Lauderdale the contractual language in effect at Greystone's other seven Florida locations.

The Respondent additionally argues that employees became aware of the foregoing changes more than 6 months prior to the filing of the charge in Case 12–CA–23071 on June 2, 2003. I have not credited the testimony of Lemon that she addressed the employees in July. There is no evidence that any employee was denied a 9th day of sick leave after August 1, thereby placing the employee on notice that the Respondent's policies had changed. The Respondent argues, in its brief, "that at the very least, the Union had notice [of the change in holidays] when Columbus Day was treated as an unpaid holiday in October 2002." There is no probative evidence that Columbus Day was treated as an unpaid holiday in 2002. Furthermore, even if the employees were not paid for Columbus Day, there is no evidence that any employee informed the Union of this. *Dutchess Overhead Doors*, 337 NLRB 347, 352 (2003).

Lemon specifically denied that there was any change in jury duty days after August 1. The document that Lemon claims she attached to her letter of July 18 and the document that Attorney Jasinski asserts he sent on November 27 both state that employees "are eligible for up to 15 days jury duty pay." The employee handbook distributed on April 28, 2003, reduces this to 10.

The probative evidence establishes that the Union first learned that there had been some change in holidays when employees reported that they had not been paid for Martin Luther King Day. The exact nature and extent of the change was not learned until April 28, 2003. In responding to the Union's inquiry regarding why employees had not been paid for Martin Luther King Day, Lemon explained that employees could take a personal day. She did not assert that she had informed employees of this in July. Nor did she elaborate and explain that the Respondent had also eliminated Good Friday and Columbus Day, thereby reducing employees' total holidays by two. The extent of the change in holidays was confirmed when the handbook issued on April 28, 2003. The handbook also reflected the reduction in sick days from 10 to 8 and a reduction in jury duty pay from 15 days to 10 days. The foregoing changes in working conditions occurred without any notice to or bargaining with the Union and violated Section 8(a)(5) of the Act.

The complaint, in subparagraph 8(e), alleges changes in the overtime policy, tardiness/absenteeism policy, and dress code policy. The Respondent, in its brief, asserts that "[n]o evidence was adduced on these subjects." The employee handbook that the Respondent admitted providing to the Union in November requires that employees who will be absent provide "at least one hour" notice before the shift begins and provides that employees who are required to work overtime will receive overtime pay for hours worked over 8 in a single day. The handbook distributed on April 28, 2003, requires "(2) two hours advance notice" for employees working on day shift and "(4) four hours" notice for employees working on the evening or night shifts. Overtime for hours over 8 required to be worked in a single day has been eliminated. The change in notification time is substantial. *Flamabeau Airmold Corp.*, 334 NLRB 165 (2001). The change in eligibility for overtime pay directly affects employee earnings. The foregoing changes, instituted without any notice to or bargaining with the Union, violated Section 8(a)(5) of the Act.

There has been no change in the written policy relating to dress. Both the present and former employee handbooks provide that management may designate casual days. Although Grant-Clarke testified that Administrator Joya Marotta, in May 2003, requested employees not to wear blue jeans, they could wear "black jeans, white jeans, khaki, or any other colored jeans apart from blue." The change to which Grant-Clarke testified was, at best, a change in practice relating only to "blue" jeans. The complaint alleges a change in "dress code policy" on April 28, 2003, the date of the distribution of the new employee handbook. The General Counsel has not established that there was a change in policy. The change in practice in May was not alleged, nor was it fully litigated since Administrator Marotta was not called to address the testimony of employee Grant-Clarke. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By refusing to meet with the Union because of the composition of its bargaining committee, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By unilaterally changing employees' working conditions by instituting a 401(k) plan, by increasing employee contributions for prescription drugs and the cost of using other than "preferred providers," by reducing the number of paid holidays, jury duty days, and sick days, by increasing the time required for advance notification for absences or tardiness, and by ceasing to provide overtime for hours over 8 required to be worked in a single day, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully refused to meet and bargain with the Union for approximately four months, shall be ordered to bargain. The General Counsel has requested that the Respondent be ordered to continue to bargain in good faith "for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962)." *Mar-Jac Poultry*, which provides for an extension of a certification year upon the resumption of bargaining, is not applicable in the instant case. Even if it were applicable, a 4-month extension of the certification year would have expired in August 2003, more than two months prior to the issuance of this decision. Consequently the bargaining obligation imposed herein shall be a general one to extend for a "'reasonable period in which it can be given a fair chance to succeed.' *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 705 (1944)." *Eastern Maine Medical Center*, 253 NLRB 224, 248 at fn. 32 (1980), enfd. 658 F.2d 1 (1st Cir. 1981).

The Respondent shall be ordered, upon the request of the Union, to rescind any or all of the unilateral changes found herein.

The Respondent, having unilaterally increased employee contributions for prescription drugs and treatment by other than "preferred providers," must make employees whole for any expenses ensuing from the its unilateral changes in prescription costs and access to medical providers other than preferred providers, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having unilaterally reduced the number of paid holidays, jury duty days, and sick days extended to employees, must make them whole for any loss with regard to the foregoing changes, with interest as prescribed in *New Horizons for the Retarded*, supra.

The Respondent, having unilaterally ceased to pay overtime for hours over 8 required to be worked in a single day, must make whole all employees for hours over 8 required to be worked in a single day at any time after April 28, 2003, by payment of overtime with interest as prescribed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Palm Court Nursing Home N.H., L.L.C. and Hidden Palm ALF, L.L.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet with Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC because of the composition of its bargaining committee.

(b) Unilaterally changing unit employees' working conditions by instituting a 401(k) plan.

(c) Unilaterally increasing unit employee contributions for prescription drugs and the cost of using other than "preferred providers."

(d) Unilaterally reducing unit employees' paid holidays, jury duty days, and sick days.

(e) Unilaterally increasing the time required for advance notification for absences or tardiness.

(f) Unilaterally ceasing to provide unit employees with overtime pay for hours over 8 required to be worked in a single day.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> All full-time and regular part-time certified nursing assistants, restorative nursing assistants, activity aides, central supply clerks, medical records clerks, dietary aides, cooks, housekeeping aides, housekeeping employees, laundry aides, laundry employees, porters and maintenance employees, and unit secretaries employed at the Respondent's facilities located at 2675 North Andrews Avenue and 2675-A North Andrews Avenue, Ft. Lauderdale, Florida; excluding all other employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act.

(b) Upon the request of the Union, rescind the increase in employee contributions for prescription drugs and the cost of using other than "preferred providers," the reduction in the number of paid holidays, jury duty days, and sick days, the increase in the time required for advance notification for absences or tardiness, and the cessation of overtime payment for hours over 8 required to be worked in a single day.

(c) Make whole all unit employees affected by the increase in contributions for prescription drugs and the cost of using other than "preferred providers" in the manner set forth in the remedy section of the decision.

(d) Make whole all unit employees for any pay lost as a result of the reduced the number of paid holidays, jury duty days, and sick days extended to employees in the manner as set forth in the remedy section of the decision.

(e) Make whole all unit employees who were deprived of overtime pay for hours over 8 required to be worked in a single day after April 28, 2003.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 7, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to meet with Service Employees International Union, Local 1199 Florida, AFL–CIO, CLC because of the composition of its bargaining committee.

WE WILL NOT unilaterally, without notifying and bargaining with the Union, change your working conditions by instituting a 401(k) plan, increasing your contributions for prescription drugs and the cost of using other than "preferred providers," reducing your paid holidays, jury duty days, and sick days, increasing the time required for advance notification for absences or tardiness, and ceasing to provide overtime pay for hours over 8 required to be worked in a single day.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon the request of the Union, bargain with the Union as your exclusive bargaining representative in the following appropriate unit concerning your terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nursing assistants, restorative nursing assistants, activity aides, central supply clerks, medical records clerks, dietary aides, cooks, housekeeping aides, housekeeping employees, laundry aides, laundry employees, porters and maintenance employees, and unit secretaries employed at the Respondent's facilities located at 2675 North Andrews Avenue and 2675-A North Andrews Avenue, Ft. Lauderdale, Florida; excluding all other employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL, upon the request of the Union, rescind the increase in unit employee contributions for prescription drugs and the cost of using other than "preferred providers," the reduction in the number of paid holidays, jury duty days, and sick days, the increase in the time required for advance notification for absences or tardiness, and the cessation of overtime payment for hours over 8 required to be worked in a single day.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make whole all unit employees affected by the increase in contributions for prescription drugs and the cost of using other than "preferred providers" in the manner set forth in the remedy section of the decision.

WE WILL make whole all unit employees for any pay lost as a result of the reduced number of paid holidays, jury duty days, and sick days extended to employees in the manner set forth in the remedy section of the decision, as set forth in the remedy section of the decision.

WE WILL make whole all unit employees who were deprived of overtime for hours over 8 required to be worked in a single day after April 28, 2003.

PALM COURT NURSING HOME N.H., L.L.C. AND HIDDEN PALM ALF, L.L.C.